No. 10-1263

Supreme Court, U.S.
FILED
JUN 3 - 2011
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DAVID JOHNS BRYSON,

Petitioner,

v.

THE CITY OF OKLAHOMA CITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MICHEAL SALEM
SALEM LAW OFFICES
101 E. Gray, Suite C
Norman, Oklahoma 73069
405-366-1234

MARK BARRETT
Counsel of Record
P.O. Box 896
Norman, Oklahoma 73070
405-364-8367
barrettlaw@sbcglobal.net

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Petitioner's Reply Brief..... 1

Further Argument 6

I. David Bryson's Case Involves an Unsettled Issue, Which the Tenth Circuit and Sixth Circuit Have Resolved in Opposite Manners, Regarding Municipal Liability for Mismanagement Which Predictably Can Cause Wrongful Convictions..... 6

II. The City's Support for and Use of Gilchrist, While Bryson Was an Oklahoma Inmate, Occurred at a Time When Questions About Gilchrist's Reliability Were Publicly Known. The City Was Not Passive in Its Support, But Instead Promoted Her for Audacious Beyond-Science Pronouncements, and Sent Gilchrist on a Mission to Use a Bogus Theory to Keep Petitioner Bryson Incarcerated 13

TABLE OF AUTHORITIES

Page

CASES

Bryson v. Macy, 611 F.Supp.2d 1234 (W.D. Okla. 2009) 11

City of Canton v. Harris, 489 U.S. 378 (1989) 1, 2

Connick v. Thompson, 131 S.Ct. 1350 (2011) 4, 5

Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) 4, 6, 7, 8

Owen v. City of Independence, 445 U.S. 622 (1980) 5

STATUTES AND ORDINANCES

42 U.S.C. § 1983 5

51 Okla.Stat. § 162 9

Oklahoma City Municipal Code, Article IV, § 2-321 8

OTHER AUTHORITY

Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C.L.Rev. 163 (2007) 6, 9

PETITIONER'S REPLY BRIEF

The Court should grant certiorari to determine whether municipal liability exists when a failure to train, and also importantly a long-term failure to supervise, an error-prone police "scientist" has the highly predictable consequence of wrongful convictions.

City of Canton v. Harris, 489 U.S. 378, 392 (1989) announced that a city's failure to assure competence of its police employees results in "liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." However, the Court ventured only slightly into defining which kinds of administrative failures are so minimal that the issue of deliberate indifference should be adjudicated through a summary judgment ruling, rather than through jury trial. The *Canton* Court, contrary to the City of Oklahoma City's intimation, opp. 17-18, proclaimed nothing conclusive even as to the medical-care training issue which was before the Court:

> The record indicates the city did train its officers and that its training included first-aid instruction. See App. to Pet. for Cert. 4a. Petitioner argues that it could not have been obvious to the city that such training was insufficient to administer the written policy, which was itself constitutional. This is a question to be resolved on remand.

Id. at 390 n.11.

Apparently because the application of *Canton*'s deliberate-indifference standard has been addressed by this Court sparingly since the time of the *Canton* decision itself, the city, in its response to the Petition for Writ of Certiorari, focused not on the reasons the municipal liability issues were or were not due for consideration, but on contentions, opp. 5-7, 23-24, 26-28, that the city behaved admirably in confronting Gilchrist's blunders and transgressions.

Noteworthy municipal omissions and commissions disprove the City of Oklahoma City's version of the history of the Oklahoma City Police Laboratory. Thus, facts support the legal theories David Bryson urges this Court to address.

One incident of overt city support for Gilchrist's misbehavior was described by John T. Wilson, who in 1986 was a chemist for the Kansas City Missouri Police Department's crime laboratory and who eventually became head of that lab. The Oklahoma City Police Department took action against Wilson after the Oklahoma City Police Chief, in February of 1986 was in the courtroom watching Wilson's testimony, in the murder trial of Alvin Parker, that hairs Gilchrist associated with Parker in fact were not microscopically similar to Parker's hairs.

The Oklahoma City police chief at that point conducted no investigation into whether Wilson was correct and whether Gilchrist was making grievous errors.

Instead, the following month, in March 1986, the Oklahoma City Police Department attacked Wilson. In his statement, presented in the courts below, for the consideration of summary judgment issues, Wilson wrote:

> On the day the McCarty trial started, investigators from the Oklahoma City Police Department contacted my agency, the Kansas City Missouri Police Department. These investigators were questioning my ethics for testifying for defense attorneys in a murder case. As a result of this inquiry and the resulting press coverage, the Chief of Police of the Kansas City Missouri Police Department instituted a policy that prohibited the working of criminal cases for defense attorneys on a private consulting basis.

Appendix, Vol. 16, pp. 4619-20 to David Bryson's Tenth Circuit brief.

Errors of omission include failure to have a laboratory manual during the 1980-1991 time span, failure to adopt proficiency testing or peer review or any other method of quality control throughout the time Gilchrist was performing blood typing and hair comparison work in the police laboratory, and failing to investigate until 1999 the quality of Gilchrist's work despite the fact that, at least as early as 1986 – see Appendix, p. 97, to the Petition for Writ of Certiorari – allegations of Gilchrist's mistakes and misconduct were in the public arena.

Because of the divergent approaches of the Sixth Circuit, *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006), and the Tenth Circuit, in the present case, this Court should consider whether a municipality is responsible, even when there is no prior wrongful conviction attributable to the errant chemist, for forensic disasters which are logically attributable to the municipality's mismanagement.

This Court should consider the related question of whether a municipality, once it is undisputably on notice that the chemist has been a monumental failure in terms of both competence and integrity, can with impunity (1) allow the chemist to use false information to keep in jail a man who is claiming accurate science would exonerate him, (2) itself keep exculpatory evidence hidden from the man who is proclaiming his innocence, and (3) ratify the chemist's misbehavior by paying her to not seek indemnification.

This Court recently has considered the issue worthy of its attention when the Fifth Circuit extended single-incident liability to a municipality which arguably provided insufficient training to its prosecutors. *Connick v. Thompson*, 131 S.Ct. 1350 (2011).

In *Connick*, the Court confronted, among other things, policy issues regarding prosecutorial independence.

Just as it was important to determine whether municipalities should be liable for certain deficiencies in prosecutorial training, likewise it is worthy of the Court's attention to determine the boundaries of

proper municipal behavior in the context of police training and supervision, deficits which would have the highly predictable result of causing wrongful convictions.

Just as there are reasons, as mentioned in *Connick*, to limit municipal liability, there are also reasons to extend it.

Individuals lose confidence in their system of government if there is no means of redress for grievances. The Court system tends to lose its power as the institution to resolve issues if United States citizens come to the realization they have no recourse if they have been abused. Nowhere is the cynicism of the individual who has been abused, and of his fellow citizens who observe his plight, more acute than when it is the government which has inflicted the abuse and it is the government claiming that, though it expects citizens to behave responsibly, the government need not.

Thus, this Court has decided that 42 U.S.C. § 1983 generally should provide compensation to persons who have suffered because their government has trampled the same constitution it is responsible for upholding. *Owen v. City of Independence*, 445 U.S. 622, 650-53 (1980).

Mr. Bryson's case, in addition to presenting an issue unresolved by this Court and an issue which has resulted in conflicting rulings from the Sixth and Tenth Circuits, involves a persistent factual scenario worthy of the Court's attention. Faulty forensic

evidence, according to one scholar, contributes to the erroneous result in the majority of known wrongful convictions. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C.L.Rev. 163, 166 (2007).

For seventeen years, in David Bryson's case, accuracy was unimportant to the City of Oklahoma City.

This Court should grant certiorari to decide the unsettled issues of constitutional importance and to take one step in restoring value to the notion that it is not processing cases, but instead processing cases correctly, that our constitution covets.

FURTHER ARGUMENT

I. DAVID BRYSON'S CASE INVOLVES AN UNSETTLED ISSUE, WHICH THE TENTH CIRCUIT AND SIXTH CIRCUIT HAVE RESOLVED IN OPPOSITE MANNERS, REGARDING MUNICIPAL LIABILITY FOR MISMANAGEMENT WHICH PREDICTABLY CAN CAUSE WRONGFUL CONVICTIONS.

The City's attempts, opp. 22-23, to distinguish David Bryson's case from *Gregory v. City of Louisville*, 444 F.3d 725 (6th Cir. 2006) fail to erase the conflict among the circuits involving an issue important to the administration of justice.

As Respondent notes, opp. 22, *Gregory* "also concerns a claim of fabricated evidence by a forensic expert. . . ."

Petitioner Bryson repeatedly has described Joyce Gilchrist's constitutional failures as involving both manufactured inculpatory evidence and suppressed exculpatory evidence. Bryson presented evidence that Ms. Gilchrist, among other things, committed *Brady* violations – the type of violation which was at issue in *Gregory*.

Whereas the failure-to-train discussion in *Gregory* focused on deficits in assuring *Brady* obligations were met, the discussion in Bryson's briefing to the lower courts focused on the failure to train Ms. Gilchrist to accomplish basic forensic tasks accurately and the absence of any supervision to assure that the "scientist" was proficient and/or ethical.

By neglecting to supervise and train well enough for the exonerating serological evidence to be revealed, the City of Oklahoma City, in essence, failed to provide the necessary training to prevent *Brady* violations.[1]

---

[1] In addition to the technical training being insufficient for exculpatory forensic results to surface, the city's training regarding exculpatory evidence per se also fell short. Gilchrist testified as follows on p. 218 of her November 13, 2007 deposition in Bryson's case:

Q. Do you recall getting any training regarding exculpatory evidence?

(Continued on following page)

The difference between *Gregory* and the Bryson case is not that they do not present the same basic factual scenario and the same basic issue as to municipal liability for single-incident or first-incident forensic failure. The difference is that each involves some issues additional to the single-incident or first-incident question.

In Bryson's case, the facts, in addition to the questions of law, extend beyond those discussed in *Gregory*.

Ratification

For example, in Bryson, the city logically could be said to have ratified Gilchrist's actions through being in league with her enough – even through the subsequent civil rights litigation – to reward her for dropping her indemnification request.[2] The City had

---

A. I might have gotten some from – during the FBI training.

Q. If you got none there, would there have been anywhere else you would have obtained training regarding exculpatory evidence?

A. I don't recall right now, no.

Q. And you don't know one way or the other whether you did in the FBI training?

A. I don't know for sure. We may have. I don't recall everything we did there.

[2] The City is incorrect in claiming that under applicable law, indemnification can only be sought by the city employee. The city ordinance, Article IV, § 2-321 of the Oklahoma City Municipal Code, cited by the city, opp. 33, defines "employee,"

(Continued on following page)

previously ratified her inept and dishonest approach to forensics, generally, by employing her for fifteen years beyond the time the public criticism of Gilchrist arose and for thirteen years after the publication of the first in a series of judicial criticisms of her work. As Byron Boshell, a police captain who finally instituted disciplinary action against Gilchrist indicated, it was known that complaints about Gilchrist had been made. However, the city files reflected no effort to investigate Gilchrist prior to 1999. See Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C.L.Rev. 163, 181 n.121 (2007).

The City had ratified Gilchrist's approach to Bryson's case in particular when it commissioned her, in 1997, to use whatever means necessary – even means which contradicted determinative forensic evidence – to preserve the convictions of David Bryson. Gilchrist assisted the prosecution in convincing a district judge that, despite the existence of DNA evidence that Mr. Bryson was not the rapist, Bryson was properly convicted as being the young legal secretary's assailant.

---

but does not state whether only an employee can seek indemnification. The statute, 51 Okla.Stat. § 162, mentioned, opp. 33, also contains no prohibition on indemnification requests filed by non-employees. In fact the statute, in part B(3), states the application is to be "filed in the name of the real party or parties in interest," signifying that the person who stands to benefit from the indemnification, as opposed to a nominal party, has the ability to take action.

Action By the City Itself

Moreover, the City of Oklahoma City, itself kept a central *Brady* violation in place, continuing to withhold Gilchrist's exculpatory laboratory notes even after Gilchrist's employment with the city had been terminated.

As Respondent acknowledges, opp. 16, it was in September of 2002, that the City of Oklahoma City produced the forensic notes that showed David Bryson actually had been exonerated by the blood type testing which Gilchrist had conducted in 1983.[3]

Gilchrist was terminated from City employment in 2001 and city administrators, since discipline at that point was finally in the works, had taken possession of her files a number of months prior to the termination. The City itself kept to itself the same exculpatory information that Gilchrist previously had kept hidden.

---

[3] Respondent points out that on page 12 of the Petition for Writ of Certiorari, counsel for Bryson stated, incorrectly, that the year the notes were received by Bryson's counsel was 2003. The notes were obtained in September of 2002. See page i of the Petition. Two additional numerical errors were made in the Petition. On page 7 of the Petition, the phrase "from the fall of 1982 until February 1993" should read "from the fall of 1982 until February 1983." On page 5 of the Petition, the sentence "[s]he enrolled in general chemistry a second time and withdrew" should read "[s]he enrolled in general chemistry a third time and withdrew."

Reasons for the City to Be On Notice

The Oklahoma State Bureau of Investigation documented Gilchrist errors in 159 cases spanning a twelve-year period. Gilchrist sometimes performed her work incorrectly. On other occasions she reported results which were at variance from what her testing demonstrated. In some instances, she omitted procedures necessary to insure her conclusions were reliable.

Examples of Gilchrist error, see Petition 6-8, were in city files prior to Petitioner Bryson's case arising.

According to the city, Gilchrist had a nine-month training period prior to doing her own cases. Using the city's version of the training length, Gilchrist's February, 1981 hair comparison examination at the FBI academy was near the conclusion of her training. At the FBI, she routinely was unsuccessful at even screening tests. Yet the city allowed her to go far beyond determining which species or which part of the body should be associated with the hair.

The City contends another chemist, Janice Davis, supervised Gilchrist at the time of Bryson's prosecution. Opp. 23, n.18. The District Court found: "After Gilchrist's training, none of her cases were reviewed by Janice Davis or anyone else. Gilchrist's Ex. 1, p. 28, ll. 16-18." *Bryson v. Macy*, 611 F.Supp.2d 1234, 1251 (W.D. Okla. 2009). Appendix 63.

The city in fact failed to institute even rudimentary supervision and did not determine (until 2001) whether Gilchrist actually learned anything during the training she attended.

Contrary to the city's implication, opp. 24-25, Douglas Lucas's expert opinion, which concluded that proper supervision would have detected Gilchrist's laboratory error and prevented Bryson's wrongful conviction, was formed with reference to standards in place prior to Bryson's conviction. Lucas stated: "These conclusions are based on standards in forensic science that applied and were generally accepted in the 1980 to 2001 period during which Ms. Gilchrist was employed in the Laboratory." Appendix to Tenth Circuit Appeal, Volume 9, p. 2492.

The city's deficits which existed prior to Bryson's conviction went significantly beyond a failure to advise a chemist of a duty to produce exculpatory evidence. The city ignored wholesale its role as Gilchrist's supervisor.

II. THE CITY'S SUPPORT FOR AND USE OF GILCHRIST, WHILE BRYSON WAS AN OKLAHOMA INMATE, OCCURRED AT A TIME WHEN QUESTIONS ABOUT GILCHRIST'S RELIABILITY WERE PUBLICLY KNOWN. THE CITY WAS NOT PASSIVE IN ITS SUPPORT, BUT INSTEAD PROMOTED HER FOR AUDACIOUS BEYOND-SCIENCE PRONOUNCEMENTS, AND SENT GILCHRIST ON A MISSION TO USE A BOGUS THEORY TO KEEP PETITIONER BRYSON INCARCERATED.

Robert Macy, who was Oklahoma County District Attorney when David Bryson was prosecuted and throughout Bryson's seventeen years of incarceration, was a vocal supporter of Joyce Gilchrist. When, in 1987, a series of investigative newspaper articles questioned the reliability of Oklahoma City's police laboratory in general, and the practices of Gilchrist in particular, Macy rose to her defense.

In one of the articles, authored by Joan Biskupic and appearing in the Tulsa Tribune, Macy described Gilchrist as being "one of the finest chemists I've ever seen." Macy stated: "Part of the problem I've had with forensic chemists is that they're too cautious." Gilchrist, he noted, was not in the "too cautious" category.

The City of Oklahoma gave Gilchrist free rein to create prosecution-tailored forensic evidence. Gilchrist's police supervisor, Harold Campbell, opined, in

1987, that if Gilchrist was good enough for Macy, then "I'm satisfied with her."

It was not long after this public questioning of Gilchrist had been summarily disregarded by the city that David Bryson first asked for DNA testing. That first request, in 1988, was met by Gilchrist's false memo that the evidence had been destroyed and that there was nothing which could be tested.

The city did not investigate upon having reason to know that Gilchrist was a fraud.

Instead, as Campbell's words indicated, looking the other way and allowing Gilchrist to pursue whatever purported science would help Macy get convictions became the policy of the City of Oklahoma City.

This period of blind support of Gilchrist, even in the wake of voices identifying her as being a forensic quack, coincided with the period when David Bryson was attempting to free himself through forensic testing.

If either the Oklahoma City Police Department or the Oklahoma County District Attorney's Office had fulfilled its constitutional duties, David Bryson would have been freed in 1988, instead of 1999. His case would have been dismissed in 1988, instead of in 2003.

In light of the harm which can be accomplished if the constitution is ignored during a person's period of incarceration, and in light of the fact that active violations of the constitution (such as the false claim

of destroyed evidence and the false public assertion that the forensic evidence was consistent with Bryson's guilt even after the DNA testing had been completed), the Court should decide under what circumstances a city can be liable for a person's continued confinement after conviction.

Respectfully submitted,

MARK BARRETT*
P.O. Box 896
Norman, Oklahoma 73070
405-364-8367
barrettlaw@sbcglobal.net

MICHEAL SALEM
101 East Gray, Suite C
Norman, Oklahoma 73069
405-366-1234

Counsel for Petitioner

**Counsel of Record*

June 3, 2011